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Supreme Court, U.S.
FILED

No. 94 639 OCT 3 1994

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DWIGHT MCKENNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DWIGHT MCKENNA
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27 pp

QUESTIONS PRESENTED FOR REVIEW

This petition raises the issue of the Sixth Amendment constitutional rights of an accused in a criminal prosecution. These rights have been secured in all criminal proceedings. The United States Fifth Circuit Court of Appeals held that in the present case this right had not been violated by petitioner's trial counsel.

1. Whether petitioner was denied his Sixth Amendment right to confrontation because his trial counsel failed to cross-examine witnesses and present a defense at trial.

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SUPREME COURT OF THE UNITED STATES

October Term 1994

No.

DWIGHT MCKENNA,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENTS.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Petitioner Dwight McKenna prays that a Writ of Certiorari be issued to review the judgment of the United States Fifth Circuit Court of Appeals entered on July 5, 1994 denying reconsideration of the Court's Order issued on June 3, 1994 which affirmed the Trial Court's

Order denying petitioner's Title 28 USC Section 2255 Motion to Vacate.

DECISIONS BELOW

The United States Fifth Circuit Court of Appeals affirmed the Trial Court decision denying petitioner's Title 28 USC Section 2255 Motion to Vacate on June 3, 1994. This Order is unreported and (reprinted) in Appendix A hereto at p. a.

The United States Fifth Circuit Court of Appeals denied the Petition for Rehearing on July 5, 1994. This Order is unreported and is (reprinted) in Appendix hereto at p. b.

The United States District Court for the Eastern District of Louisiana entered Final Judgment on July 30, 1993. This Order is

unreported and (reprinted) in Appendix hereto at p. c.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment sought to be reviewed was initially entered on June 3, 1994 by the United States Fifth Circuit Court of Appeals. The denial of request for a rehearing was entered on July 5, 1994. The statutory provision conferring jurisdiction on this Court to review the judgment by Writ of Certiorari is Title 28 USC Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On September 19, 1991 petitioner was charged with a Grand Jury Indictment alleging two counts of willfully making false statements on his federal income tax returns in violation of Title 26 USC 7206(1) for the calendar years 1987 and 1988.

On February 10, 1992, a jury trial commenced before Judge Charles Schwartz, Jr.

The government presented its case and concluded with Michael Bruno, a key prosecution witness. After the close of direct examination defense counsel indicated that a memorandum requesting the opportunity to present leading questions had been filed. (Tr. Vol. IV, p. 846). The jury was excused and discussion followed regarding the motion and the issues represented in said motion regarding leading questions. The Court indicated that latitude would be given defense counsel in permitting leading questions if a problem was encountered in eliciting testimony from the witness. (Tr. Vol. IV, p. 854). Defense counsel was not satisfied with this ruling and requested an in-camera presentation in order to clarify for the Court why leading questions were necessary and should not be limited in any manner. (Tr. Vol. IV, p. 855). The request for an

in-camera presentation was granted. (Tr. Vol. IV, p. 855-856). Upon completion of the in-camera presentation the Court reiterated that the previous ruling would stand. (Tr. Vol. IV, p. 859-860). Defense counsel then moved for a recess to discuss the ruling and it was granted. (Tr. Vol. IV, p. 860). When the trial resumed defense counsel declined to examine the witness "in light of the Court's ruling". (Tr. Vol. IV, p. 860). Shortly afterwards, the government rested its case and the defense indicated once again that "in light of the Court's ruling" it would rest its case. (Tr. Vol. IV, p. 862). The Court then instructed the jury that the case was concluded and a recess was called in order to afford the defense counsel an opportunity to "convince" the Court that the previous ruling was inappropriate or in error. (Tr. Vol. IV, p. 862). The Court then

indicated to all counsel that a formal order would be rendered "regarding restrictions on the Cross-Examination of the testimony of the last witness." (Tr. Vol. IV, p. 863). Furthermore, the court indicated that it would furnish defense counsel with a transcript of the ruling, that defense counsel should discuss the issue with the petitioner and afforded defense counsel the opportunity to withdraw its "previous assertion that the Defense rests" (Tr. Vol. IV, p. 863). Defense counsel informed defendant at this time that they would be unable to continue in the trial because his Sixth Amendment right to confront the witness had been violated and furthermore, they would not be able to effectively elicit the testimony necessary in order to properly defend petitioner. Furthermore, they refused to continue to defend him at trial and informed him that the

only alternative measure available to him at that time was to rest the case and pursue an appeal. On February 14, 1992 a chambers conference was held to discuss the ruling of the Court from the previous day regarding the permissibility of leading questions by defense counsel. Once again, defense counsel declined to continue to represent petitioner at the trial. A minute entry was read into the record, the jury returned to the Courtroom and the trial resumed with closing arguments. (Tr. Vol. V, p. 866). The jury went into deliberations on the same day and reached a "deadlock". However, the Trial Court declined to discharge the jury. On February 15, 1992, the following day, the jury returned a verdict of guilty on both counts charged against petitioner. (Tr. Vol. V, p. 914).

Defense counsel filed a document dated February 14, 1992 entitled Memorandum: The Defendant Is Entitled to Confront Government Witness Michael Bruno On Cross-Examination By Asking Leading Questions. Said document indicated that the court had "suggested in earlier rulings that the defendant could not confront an adversarial witness with leading questions on cross-examination if the witness were 'identified with the defendant', and proceeded to dispute such rulings.

On March 19, 1992 defense counsel filed a Motion for a New Trial and Incorporated Memorandum on the grounds that petitioner was denied his "right, guaranteed by the Sixth Amendment to the United States Constitution, of effective confrontation" by "the court's refusal to permit leading questions of Mr. Bruno on cross-

examination; and that he was denied the right to effective cross-examination".

On April 28, 1992 defense counsel filed an Affidavit of Dominic J. Gianna, an expert witness retained for the purposes of presenting expert testimony regarding cross-examination purposes and techniques.

On April 29, 1992, petitioner was sentenced by the Trial Court to 15 months imprisonment on both counts to run concurrently.

On December 2, 1992, defense counsel filed an appeal with the Fifth Circuit Court of Appeals concerning the issue of leading questions during cross-examination of prosecution witness Michael Bruno. The Trial Court's ruling was affirmed.

On June 21, 1993 petitioner filed a motion pursuant to Title 28 USC Section 2255 seeking

relief from such conviction due to ineffective assistance of counsel. This was the initial stage at which the federal question sought to be reviewed was raised. Petitioner submitted that his Sixth Amendment right to confrontation had been violated by defense counsel at trial because they denied him the right to confront a key witness presented by the government and at a critical stage during the trial denied him the right of assistance. The United States Supreme Court case U.S. v. Cronic was cited as the precedent for this case because it sets the standard that a presumption of prejudice entitles a defendant to a vacated sentence when he has been denied the above-mentioned rights at trial. Petitioner's motion was denied by the Trial Court on the grounds that petitioner's counsel had not violated such rights.

On December 15, 1994 petitioner submitted an appeal from the Federal Court's decision denying petitioner's Motion to Vacate. This was the second time in which the federal question sought to be reviewed was raised. Once again, petitioner argued that the Trial Court erred when it ruled that the defense counsel had not denied petitioner effective assistance.

On June 3, 1994, the Appellate Court affirmed the Trial Court's decision denying petitioner's 28 USC Section 2255 Motion to Vacate.

On June 17, 1994, petitioner submitted a Petition for Rehearing to the Appellate Court. Petitioner once again submitted the same argument that the rights of petitioner had been violated when defense counsel refused to cross

examine a key witness at trial and furthermore refused to continue to represent him.

On July 5, 1994, the Appellate Court denied petitioner's request for rehearing.

ARGUMENT

The Petition for Certiorari should be granted because the United States Fifth Circuit Court of Appeals has decided an important issue of federal law contrary to legal precedent set by this Court.

> For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. Strickland v. Washington, 80 L.Ed. 691.

This Court set out a two prong standard by which to judge whether ineffective assistance of

counsel has occurred in a defendant's trial.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id., at 693.

The Federal and Appellate Courts improperly ruled that the Strickland case set the precedent for the above-captioned matter and that defense counsel's performance was not deficient, nor did petitioner show that defense counsel's conduct prejudiced the outcome of the trial.

However, the Strickland Court further

indicated that prejudice could be presumed and referenced U.S. v. Cronic, 466 U.S. 468, 80 L.Ed. 2d 657, 104 S.Ct. 2039.

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. Strickland v. Washington, at 696.

In U.S. v. Cronic this Court indicated that the very circumstances which occurred in petitioner's trial were unconstitutional.

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v.

> Alaska, 415 US 308, 39 LEd 2d 347, 94 S Ct 1105 (1974), because the petitioner has been 'denied the right of effective cross-examination' which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it'. US v. Cronic, at 668.

The circumstances surrounding the present case are specifically addressed in the Cronic case. Petitioner was denied counsel at a critical stage in his trial and he was also denied the right to effectively cross-examine a key prosecution witness because the defense counsel inaccurately interpreted the Trial Court's ruling regarding leading questions and therefore refused to even continue the trial.

The Cronic Court has also indicated that

the vulnerability of the defendant is to be carefully protected and guarded.

> While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators. Id. at 667.

Petitioner was virtually unarmed against the government because without counsel he could not properly represent himself.

Finally, the Cronic Court indicated the following:

> ...only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial. Id. at 670.

Defense counsel's performance was no longer an issue and the focus should have shifted to the fact that petitioner had no defense at trial

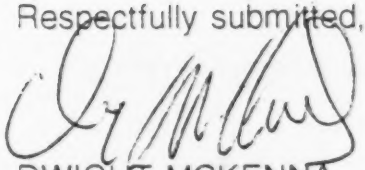
rather than whether or not the defense counsel's performance was adequate.

CONCLUSION

This case presents an important issue that has already been decided by this Court. The Sixth Amendment provides that a defendant is entitled to confront the witnesses against him, present the witnesses in his favor and to have effective assistance by his counsel. Each of these rights afforded by the Sixth Amendment was violated by petitioner's trial counsel. He is entitled to due process and equal protection as guaranteed by the Sixth Amendment. For these

reasons, this Court should grant the Petition for Certiorari.

Respectfully submitted,



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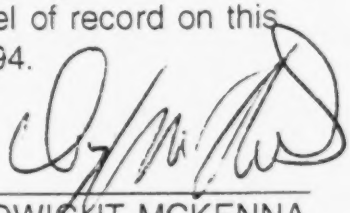
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been furnished to all counsel of record on this 3rd day of October, 1994.



DWIGHT MCKENNA

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3684
Summary Calendar

D.C. Docket No. CA-93-2015 (CR-91-446A)

United States of America,

Plaintiff-Appellee,

v.

Dwight McKenna,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before DAVIS, JONES, and DUHE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

June 3, 1994

(Reprint)

b

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3684

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DWIGHT MCKENNA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
(July 5, 1994)

Before DAVIS, JONES, and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
John M. Duhe Jr. (signed)
United States Circuit Judge

C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	Criminal Action No. 91-446
VERSUS	
DWIGHT MCKENNA	Section "A" (ref: C.A. 2015)

JUDGMENT

Considering the written Order and Reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that the motion of Defendant Dwight McKenna pursuant to 28 USC 2255 be and is hereby denied.

New Orleans, Louisiana, this 30th day of July, 1993.

Charles Schwartz, Jr. (signed)
UNITED STATES DISTRICT JUDGE